

Memorandum

cc: Olson
Tarr
Shanks
*Simms
Files
Sudol
Retrieval



Subject

Recission of Requirement for Quarterly
Reports by United States Attorneys
Regarding News Media Subpoenas

Date

SEP 1 1984

To

Roger Clegg
Associate Deputy Attorney
General
Office of the Deputy Attorney
General

From

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

This responds to your note of August 22, 1984 forwarding to this Office for review an "ACTION MEMORANDUM" prepared by the Director of the Executive Office for U.S. Attorneys, dated August 17, 1984, on this subject.

We are not in a position to assess the continued usefulness of the reports on this subject required by Attorney General Memorandum No. 778. We do believe, however, that given the sensitivity normally associated with this general subject, the Office of Public Affairs should be consulted on this matter. We note that the concurrence form transmitted to us suggests that that Office will not be consulted prior to this package's transmittal to the Attorney General.

On a more substantive note, we do not believe that this particular action need be taken by a formal Attorney General Order, and in any event we question the substance of the proposed Order as drafted. As regards the first point, Attorney General Memorandum No. 778 was issued at a time when guidelines regarding the issuance of subpoenas to members of the news media were already established in 28 C.F.R. § 50.10. The reporting requirements imposed on Assistant Attorneys General and United States Attorneys by that memorandum were not incorporated into 28 C.F.R. § 50.10 at that time, nor have they since been incorporated into § 50.10. In short, the reporting requirements stand as a separate instruction from the Attorney General related to, but independent of, § 50.10. Thus, we believe that what Attorney General Levi did by memorandum may appropriately be rescinded by a similar Attorney General memorandum addressed to the same officials within this Department as was Memorandum No. 778.

With respect to the second point, we do not understand in what respect Attorney General Order 916-80 (Nov. 5, 1980), at the time it was issued or now, could be said to have "superseded" Attorney General Memorandum No. 778. Attorney General Order 916-80 does not deal in any way with reporting requirements. It constituted a substantive revision to 28 C.F.R. § 50.10 as in effect prior to that time and, as we point out above, § 50.10 did not address reporting requirements. Attorney General Memorandum No. 778 has never been viewed as having been incorporated into 28 C.F.R. § 50.10, and therefore the inference to be drawn from the draft order -- that Memorandum No. 778 was superseded by Attorney General Order 916-80 -- is simply incorrect. */

Based on these concerns, we recommend that this matter be referred to the Office of Public Affairs and that appropriate correspondence for the Attorney General's signature be drafted by that Office and the Executive Office for United States Attorneys.

Finally, we believe that whether the media subpoena procedures are "well known and universally observed" might be open to some argument. We believe that there may have been one or two instances during this Administration when they were not fully observed. The reporting requirements may serve as a useful reminder to the U.S. Attorneys that this is an important and delicate subject. Revocation of this requirement might well be regarded as some modification of the seriousness with which the Attorney General regards such matters and, more importantly, might be perceived by the media as such. These considerations should be available to the Attorney General when he makes his decision regarding revocation.

*/ Another possible interpretation of the draft order would be that by issuing it, the present Attorney General would be reading into a former Attorney General's order an intent that is plainly not in that order. Were there a basis to interpret Order No. 916-80 as having rescinded Memorandum No. 778, such as evidence extrinsic to that Order establishing an intent on the part of former Attorney General Civiletti to do so, then it might be appropriate for the Attorney General or even one of his subordinates to issue a memorandum clarifying that point. Because we are not aware of any basis to interpret Order 916-80 as having rescinded Memorandum No. 778, we need not address this issue.